IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-1255

JAMES C. ANDERS,

Appellant,

v.

JESSE J. FLOYD, M.D.,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA,
COLUMBIA DIVISION

MOTION TO DISMISS OR AFFIRM
AND
BRIEF IN SUPPORT OF MOTION

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MOTION TO DISMISS OR AFFIRM

Pursuant to U.S. Sup. Ct. Rule 16, appellee respectfully moves the Court to dismiss this appeal for want of a substantial federal question or, in the alternative, to affirm the judgment below.

Respectfully submitted,

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BRIEF IN SUPPORT OF MOTION TO DISMISS OR AFFIRM

Appellee respectfully submits this brief in support of the motion to dismiss or affirm.

JURISDICTION

Dr. Floyd seeks dismissal of this appeal because it presents no new or substantial federal question. *Byrn v. New York City Health and Hospitals Corp.*, 31 N.Y.2d 194, 286 N.E.2d 887 (1972), *appeal dismissed*, 410 U.S. 949 (1973). The questions of abstention and viability raised by the appellant were well settled by this Court in

Roe v. Wade, 410 U.S. 113 (1973), and *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976). In the alternative, appellee Floyd requests this Court to affirm the decision of the three-judge court summarily. *See Planned Parenthood, supra; Sendak v. Arnold*, 429 U.S. 968 (1976), *aff'g mem.* 416 F. Supp. 22 (S.D. Ind.)(per curiam); *Coe v. Gerstein*, 428 U.S. 901 (1976), *aff'g mem.* 517 F.2d 787 (5th Cir. 1975).

The district court had incontestable jurisdiction to determine the merits of Dr. Floyd's claim. On its face the South Carolina abortion statute, S.C. Code §44-41-20 (formerly §32-682(c), 1962 Code as amended), unconstitutionally restricts abortion through its third trimester-25 week clause, in direct violation of *Planned Parenthood v. Danforth, supra*, and *Roe v. Wade, supra.*

QUESTIONS PRESENTED

I

Whether the federal district court had jurisdiction to permanently enjoin the threatened state prosecution of Dr. Floyd?

II

Whether the third trimester-25 week clause of the South Carolina Abortion Law, S.C. Code §44-41-20 (formerly §32-682(c), 1962 Code as amended), abridges the Fourteenth Amendment right of privacy, is inconsistent with the express holdings of *Roe v. Wade*, and *Planned Parenthood v. Danforth*, and is not supported by any compelling medical evidence?

III

In any case, was the abortion of Louise Doe protected by the holdings of *Roe v. Wade* and *Planned Parenthood v. Danforth*?

A. Whether the Doe abortion was pre-viable and thus protected as a matter of law?

B. Whether the Doe abortion, even if viable, was protected by the mental health qualification of *Roe v. Wade*?

STATEMENT OF THE CASE

Prosecutor Anders sought, in August of 1975, to indict physician Floyd for murder and illegal abortion following a pregnancy termination about a year earlier at Richland Memorial Hospital, Columbia, South Carolina. The abortion resulted in a live birth. As a result, the aborted fetus was promptly taken to a neonatal intensive care unit (Wall Dep. at 3), where it remained for three weeks of heroic medical efforts. This fact contradicts Prosecutor Anders' claim that "the decision [of the three-judge court] denies protection of law to infants born alive after an abortion . . ." (Jurisdictional Statement [hereafter J.S.] at 10). Here, no protection was denied the fetus once it was born alive.

Further, Prosecutor Anders knew about *Roe v. Wade*, 410 U.S. 113 (1973), and that it was controlling. However, he admitted that he voluntarily limited his knowledge of *Roe*. (Anders Dep. at 13). As the three-judge court found, "[h]e had read about it in a magazine [*Newsweek*], and he had a digest of it prepared by a first-year law student, which, in several respects, was quite misleading." (J.S. at 5a; *Floyd v. Anders*, 440 F. Supp. 535, 539 (D.S.C. 1977)).

After full briefing, argument, and an adverse decision on the merits as to four sections of the South Carolina

abortion law, the State conceded error on three legal points: spousal consent, parental consent, and multiple physician consultation. (J.S. at 2). However, the State has appealed the injunction permanently enjoining the attempted indictments for abortion and felony murder.

ARGUMENT

I.

THE FEDERAL DISTRICT COURT HAD JURISDICTION TO PERMANENTLY ENJOIN THE STATE PROSECUTION OF DR. FLOYD.

A. The Abstention Doctrine Is Inapplicable Where No Proceeding Is "Pending" In State Court.

Since *Ex Parte Young*, 209 U.S. 123 (1908), it is clear that under certain circumstances a federal court can enjoin enforcement of a state statute on federal constitutional grounds. However, where there is an "ongoing" state prosecution, federal court intervention is limited by "notions of comity and federalism." *Younger v. Harris* 401 U.S. 37, 44-45 (1971). Conversely, when no state criminal proceeding is pending, *Younger, supra*, and its companion cases are fundamentally inapplicable. *Steffel v. Thompson*, 415 U.S. 452 (1974).

In the present instance, the *Younger* abstention doctrine does not apply, since no ongoing state proceeding existed before the federal court proceedings. A temporary restraining order was issued against Anders in federal court on the afternoon of August 28, 1975, one day after the action in federal court was filed and one day before the indictments were returned in state court. The three-judge court has characterized these events as follows:

> "At the outset we are met with the contention by the defendant that under the doctrine of *Younger v. Harris*, 401 U.S. 37, we should abstain. Here, the federal complaint was filed before the indictments, and the temporary restraining order issued on the same afternoon during which the grand jury voted to return the indictments and the day before the indictments were actually returned in open court, so the literal holding of *Younger* is inapplicable." (J.S. at 2a; *Floyd v. Anders*, 440 F. Supp. 535, 537 (D.S.C. 1977)).

While appellant Anders contends that an "ongoing state court proceeding" had commenced before the indictment was returned, he fails to consider several decisions which demonstrate why the abstention doctrine is inapplicable.

In *Ex Parte Young, supra*, this Court stated;

> "When [in state court an] indictment or proceeding is brought to enforce an alleged unconstitutional statute, which is the subject matter of inquiry in a suit already pending in a Federal Court, the latter court, having first obtained jurisdiction over the subject matter, has the right, in both civil and criminal cases, to hold and maintain such jurisdiction, to the exclusion of all other courts, until its duty is fully performed." 209 U.S. at 161-162.

Dombrowski v. Pfister, 380 U.S. 479, 484 n. 2 (1965), also states:

> "Since the grand jury was not convened and indictments were not obtained until after the filing of the complaint . . .no state 'proceedings' were pending . . . ."
>
> "Nor are the subsequently obtained indictments 'proceedings' against which [federal] injunctive relief is precluded . . . ."

Most recently in *Judice v. Vail*, 430 U.S. 327 (1977), this Court abstained where it was clear that appellees, judgment creditors, had an ample opportunity to present their constitutional claims at pre-existing, ongoing state proceedings. As this Court noted, their failure to avail themselves of such opportunities, in Vail's case for nine months, during which a deposition was scheduled and several hearings held, does not negate the fact that "ongoing" civil enforcement proceedings existed. 430 U.S. at 330. Thus, where "ongoing" state proceedings beyond the complaint stage have or are occurring, *Younger* abstention may apply. Conversely, where no complaint in state court has been filed, as here, no "ongoing" proceeding exists, and *Younger* abstention does not apply.

Two recent lower court decisions also consider pendency in state courts for purposes of abstention. In *Four Unnamed Plaintiffs*, 424 F. Supp. 357 (D. Mass. 1976), *reversed on other grounds*, 550 F.2d 1291 (1st Cir. 1977), four prisoners were removed to segregated facilities without benefit of notice or a hearing on the charges precipitating removal. The district court addressed the arguments against federal intervention as follows:

> "[I]t has been suggested that federal court intervention in this situation is inappropriate out of a concern for comity. Defendants, as well as the Norfolk County District Attorney, assert that any relief granted to plaintiffs by this court will interfere with *an on-going state administrative and criminal investigation.* Defendants refer to the equitable abstention doctrine, evolving from *Younger v. Harris*, 401 U.S. 37 (1971), by which a federal court should not interfere with an on-going state criminal proceeding." 424 F. Supp. at 362. (Emphasis added.)

However, the district court found *Younger* inapplicable:

> "The court does not interpret the doctrine to require federal courts to avoid interference with state criminal or administrative proceedings in the *pre-indictment* stage, as in the case here." 424 F. Supp. at 362. (Emphasis added.)

And, in *Penthouse International v. McAuliffe*, 436 F. Supp. 1241 (N.D. Ga. 1977), a temporary restraining order was issued prior to state prosecution of certain magazines.

> "The second and most important limitation upon *Younger* is a temporal one which provides that if there is a justifiable case or controversy which is not yet the subject of state court proceedings, federal intervention is permitted since the state has not yet chosen to act *and therefore federal action could not offend notions of comity and federalism.* In temporal terms, the instant action is precisely in the foregoing *'post act-pre prosecution' procedural posture because plaintiffs have vended the subject magazines but have not yet been prosecuted in state court for so doing.*" 436 F. Supp. at 1247. (Emphasis added.)

The court added:

> "since *no indictment issued* and since the instant proceedings are now far more than embryonic, we would not surrender jurisdiction here, even if indictments were now forthcoming." 436 F. Supp. at 1247, n. 13. (Emphasis added.)

In the present case, the federal complaint was filed more than an entire day before the state grand jury convened; the federal district court heard substantial argument on the merits of a restraining order one day before the indictment was returned in open court.

If Appellant Anders had obeyed the order of the court and withdrawn the indictment, it would never have been presented in open court, and there would be no *Younger* question. In any event, the federal restraining order came before the state proceeding. Appellant Anders admitted this in his deposition. When asked if "Dr. Floyd was not charged until the indictment was published . . .," Anders stated: "That's correct." (Anders Dep. at 37). If this is true, there was no pending proceeding within the meaning of *Younger*.

Several analogies are useful. A decision by this Court is secret and not effective until published. Any vote may be changed prior to publication. Similarly, a jury verdict has no effect until announced in open court. Cases are frequently settled and/or withdrawn during the deliberations of courts and juries. After the external action is taken, the prior deliberations are moot and of no effect. Anders cannot elevate an unpublished grand jury vote to an "ongoing state proceeding." The vote was secret. No one knows the numbers in favor or even the time of day of the vote.

B. The Abstention Doctrine Is Inapplicable Where A "Proceeding Of Substance" Occurred In Federal Court, Prior To Issuance Of The Indictments Against Dr. Floyd.

Appellant, based upon *Hicks v. Miranda*, 422 U.S. 332, 349 (1973), contended below that no "proceeding of substance" occurred in federal court prior to the commencement of state prosecution. Appellent's use of *Hicks* is misplaced for several reasons.

First, in *Hicks* the Court pointed out that appellees had already developed a substantial stake in the state proceedings, and, therefore, the *Younger* doctrine should be applied. The substantial stake that appellees had in *Hicks*

does not exist in the present case. In *Hicks*, two employees of a theater had been charged in Municipal Court and four copies of the allegedly obscene material had been seized, were being held, and had been declared to be obscene and seizable by the Superior Court. In the present case, no state proceedings were initiated or completed involving the appellee, thus, no substantial stake or state involvement similar to that in *Hicks* existed at the time federal proceedings were held. Here there was not even a piece of paper or a state court file number.

Second, *Hicks* does not apply because in the present case, "proceedings of substance on the merits" did occur in federal court prior to the beginning of state proceedings. In *Hicks*, the appellees were formally charged prior to answering the federal case and prior to any proceedings whatsoever before the federal court. In contrast, in the present case, before the appellee was charged, a federal TRO hearing was held in which there was a detailed discussion of the merits of appellee's claims.

At page four of the transcript of the TRO hearing the Court asked:

> "THE COURT: Now why, Mr. Anders, is it not subject to *Roe v. Wade*?" Tr. at 4, Hearing August 28, 1975, before the Honorable Robert F. Chapman, *Floyd v. Anders*, Civ. No. 75-1481 (D.S.C.).

The parties then proceeded to argue and discuss the merits in great depth, comparing the S.C. abortion law language with the *Roe, supra*, 410 U.S. 113, holding.

On page 7 of the hearing transcript the Court discussed the possible inconsistency between the South Carolina statute and *Doe v. Bolton*, 410 U.S. 197 (1973), concerning the requirement of two physicians. The transcript continues a discourse on the merits, moving on page 19 to a discussion of the murder indictment in light of *Roe, supra*.

While the duration of the hearing is not recorded, the hearing lasted for about an hour (J.S. at 16), as long as the time allotted in this Court for full appellate arguments. This surely constituted "proceedings of substance on the merits," 422 U.S. at 349, within the dictum of *Hicks*. The TRO hearing transcript is as long as the memorandum brief of the state on the merits below.

Further, *Doran v. Salem Inn*, 422 U.S. 922 (1975), shows that federal injunctive relief was applied to protect against an imminently threatened invasion of federally protected rights. *Doran* upheld the issuance of an interim injunction where "[n]o state proceedings were pending against either [federal plaintiff] at the time the District Court issued its preliminary injunction." 422 U.S. at 930. The Court in *Doran* squarely held that "injunctions of future criminal prosecutions are . . . not subject to the restrictions of *Younger*." 422 U.S. at 930. Thus, *Doran* more clearly applies than *Younger* or *Hicks* since the temporary injunction is brought against a future criminal prosecution.

As the three-judge court in this case said:

> "The defendant contends, however, that the [abstention] principle applies since no 'proceeding of substance on the merits' had taken place in the district court before the prosecution was commenced. *Hicks v. Miranda*, 422 U.S. 332. But *see*, *Doran v. Salem Inn*, 422 U.S. 922. One would suppose that the actual issuance of a temporary restraining order, after a hearing, was a proceeding of substance in the district court within the meaning of *Hicks* . . . ." (J.S. at 2a; *Floyd v. Anders, supra*, 440 F. Supp. at 537.)

C. The Federal Court Has Jurisdiction to Enjoin A State Criminal Proceeding Brought In Bad Faith.

Even if *Younger, supra*, and *Hicks, supra*, are held to apply, the federal court could assert jurisdiction where, as here, the state prosecution has proceeded in bad faith and, in addition far-reaching irreparable injury to the appellee and his patients would occur.

Younger makes it plain that direct federal intervention in state proceedings is permissible upon a "showing of bad faith, harassment, or any other unusual circumstance that would call for equitable relief." 401 U.S. at 54.

Further explanation of the "bad faith" exception was offered in *Kugler v. Helfant*, 421 U.S. 117 (1975), where this Court defined "bad faith" to mean "that a prosecution has been brought without a reasonable expectation of obtaining a valid conviction." 421 U.S. at 126 n. 6.

Appellee argues here that the three-judge court properly took jurisdiction where the state prosecution proceeded in "bad faith" and, in addition, far-reaching irreparable injury can be shown.

The fact of irreparable injury has never been challenged. If the state court is allowed to take jurisdiction, Dr. Floyd would definitely be prosecuted. The repercussions of this indictment in appellee's personal and professional life would be far-reaching. Additionally, there would occur a wholesale cutback of available midtrimester abortion services in South Carolina. Indeed, an unjustifiable cutback has already occurred. The Director of Obstetrics and Gynecology at Richland Memorial Hospital, Dr. Dennis, has testified that he has

imposed an 18-week limitation for abortions in his department (Dennis Dep. at 23). This limitation has been imposed in addition to the quota which already exists, limiting midtrimester abortions to four per week. (Dennis Dep. at 26). (J.S. at 5 n. 10). These limitations are particularly severe since no other hospital in South Carolina performs midtrimester abortions (Dennis Dep. at 54).

Solicitor Anders also could not have reasonably anticipated conviction of Dr. Floyd and is, therefore, chargeable with bad faith prosecution. First, Anders had constructive knowledge that the multiple physician requirement of the South Carolina abortion law is directly at odds with *Doe v. Bolton, supra,* a holding which appellant has conceded on appeal. (J.S. at 2, n.3). Second, Anders was on notice that the 25 week viability provision in the South Carolina abortion law was facially at odds with the 28 week general rule of *Roe* v. *Wade, supra,* which emphasizes physician discretion. (*See* Sec. II *infra.*). Third, there was no factual evidence from which to conclude that Dr. Floyd knowingly aborted a post-viable fetus. In fact the medical records indicate the very opposite. (*See* Sec. III A). Finally, the records known to appellant Anders showed pre-viability of the fetus, as well as the medical necessity for an abortion, to preserve the patient's mental health, regardless of length of pregnancy. (*See* Sec. III). In conclusion, Prosecutor Anders had no factual basis for proceeding under the patently unconstitutional South Carolina abortion statute.

Anders' bad faith is further evidenced by his decision to request and obtain a capital murder indictment against Dr. Floyd; his reliance upon a magazine (*Newsweek*) article for authority instead of *Roe v. Wade, supra*, or medical evidence; his failure to comply with the order to withdraw the indictment; and his disregard of substantial exculpatory evidence.

1. Anders' Request For A Murder Indictment Against Dr. Floyd

What Dr. Floyd openly and reasonably thought to be a lawful pre-viable 24-week therapeutic abortion somehow became the object of a murder indictment with capital consequences in the hands of appellant Anders. There is no rational answer to the question of how one can find murder when a fetus temporarily survives an abortion and is immediately treated with all heroic efforts in a neonatal intensive care unit. Appellant Anders had no support in law, facts, or theory for his charge of murder. This is clearly a case where "a prosecution has been brought without a reasonable expectation of obtaining a valid conviction," *Kugler v. Helfant,* 421 U.S. at 126 n.6 (1975); *Timmerman v. Brown,* 528 F.2d 811, 815 (4th Cir. 1975).

Preliminarily, there can be no murder unless an injury is inflicted upon a "person," causing his or her death. This prerequisite cannot even at the outset be met by the State. As this Court in *Roe v. Wade, supra,* 410 U.S. 113, observed, it is "doubtful that abortion was ever firmly established as a common law crime even with respect to the destruction of a quick fetus." 410 U.S. at 136. As pertains to American law, *Roe* specifically holds that "the word 'person,' as used in the Fourteenth Amendment, does not include the unborn." 410 U.S. at 158. Moreover, "the unborn have never been recognized in the law as persons in the whole sense." 410 U.S. at 162. In view of this very explicit language in *Roe*, which appellant Anders admittedly never did read (Anders

Dep. at 13), there was no basis for making a murder charge.[1]

There are, of course, no South Carolina cases or statutes on which appellant Anders could rely in charging murder. At his deposition, appellant Anders suggested that the felony murder doctrine was applicable, and that a 26-week fetus was a person for such purposes. (Anders Dep. at 10). That is a double bootstrap argument. Under *Roe* the fetus is not a person, and the underlying felony statute itself is inapplicable.

Further, prosecutor Anders acted in bad faith when he requested an indictment for murder as well as a criminal abortion against Dr. Floyd when, in fact, there was and is no evidence of criminal intent. This same issue was raised in *Commonwealth v. Edelin,* 359 N.E. 2d 4 (Mass. 1976), where the Supreme Judicial Court of Massachusetts reversed the manslaughter conviction of Dr. Edelin for performing a late-second trimester abortion. The Massachusetts appellate court held:

> "[F]ive Justices are agreed that there was insufficient evidence to go to a jury on the overeaching issue whether Dr. Edelin was guilty beyond a reasonable doubt of the 'wanton' or 'reckless' conduct resulting in a death required for a conviction . . . [of manslaughter]." 359 N.E.2d at 5.

Further, the court stated:

> "[O]n any view of viability tenable under *Wade - Bolton*, there was no sufficient showing of reck-

[1]Appellant Anders admitted he had never read *Roe v. Wade* and knew nothing about *Doe v. Bolton* or the prevailing Fourth Circuit decision *Vuitch v. Hardy*, 473 F.2d 1370 (4th Cir.), *cert. denied*, 414 U.S. 824 (1973). (Anders Dep. at 13). He did, however, state that in deciding to prosecute Jesse Floyd "*Newsweek* was significant to me . . . ." (*Id.* at 25).

> lessness in Dr. Edelin's prenatal conduct . . . His 'quo animus' turned on whether he believed in good faith that the fetus was not viable at the time of the operation and was not palpably unreasonable in this belief – a combination of an internal and an external standard of criminality . . . Of course manslaughter could not be supported by proof merely of a mistake of judgment, even if that was the result of negligence or gross negligence." 359 N.E. 2d at 13.

Anders' pursuit of criminal murder, as well as abortion, charges without evidence is the first major element of bad faith. As the three-judge court stated concerning the criminal murder indictment requested by Anders:

> "If a state may not legislate for the protection and preservation of the life of such a fetus, it surely cannot make the surgical severance of the fetus from the womb murder under state law. But the prosecutor here sought and obtained an indictment for murder as well as an indictment for performing an illegal abortion, when that, too, was clearly foreclosed by *Roe v. Wade.*" (J.S. at 6a; *Floyd v. Anders*, *supra*, 440 F. Supp. at 539).

2. Anders' Reliance Upon *Newsweek* Instead of *Roe v. Wade*, *Doe v. Bolton*, and Medical Evidence.

Appellant Anders admitted he had not read *Roe v. Wade*, 410 U.S. 113 (1973), but only a synopsis prepared by a first year law student. He knew nothing about *Doe v. Bolton,* 410 U.S. 179 (1973), which was not mentioned in the brief synopsis, and also knew nothing about the controlling decision in the Fourth Circuit, *Vuitch* v. *Hardy*, 473 F.2d 1370 (4th Cir. 1973) (per curiam). (Anders Dep. at 13).

Appellant Anders also did not know what this Court said in *Roe*, if anything, about "viability" (Anders Dep. at 14), did not seek an opinion on the constitutionality of the statute (Anders Dep. at 41), and did not even look at any medical textbooks or articles on the subject (Anders Dep. at 26) before seeking indictments. Prosecutor Anders, by his own admission, "read write-ups in *Newsweek* and that sort of thing . . ." (Anders Dep. at 25). He stated: "*Newsweek* was significant to me, reading that particular article on the Boston case up there . . . ." (Anders Dep. at 25). Asked to "recall any other written materials that you've relied upon in deciding to seek an indictment," Anders stated: "I don't recall any others." (Anders Dep. at 25).

The law student synopsis and memorandum, along with *Newsweek*, comprised the total legal research of Anders up to the time of his deposition on September 15, 1975. The handwritten synopsis was prepared by a freshman law student, Mr. McLean. (McLean Dep. at 6). *Doe v. Bolton* was not included in that synopsis because Mr. McLean had not read that far. (McLean Dep. at 10).

Solicitor Anders relied upon such materials to bring murder and illegal abortion charges. The synopsis does not even allude to the central question of "viability" but instead mentions "quickening," an old common law concept abandoned as not meaningful. The synopsis was clearly insufficient since it never reached the issues of viability and 25 weeks gestation. As the three-judge court concluded:

> "The prosecutor, however, was chargeable with knowledge of what *Roe v. Wade* actually held, and he was not entitled to proceed on the basis of what he supposed the law to be without having read what the Supreme Court had said. Had he but read the opinion for the majority in *Roe v. Wade*, he would have known that the fetus in this case was not a person whose life state law could legally protect." (J.S. at 6a; *Floyd v. Anders, supra*, 440 F. Supp. at 539).

The *Newsweek* article itself provides no basis for the felony charges. This article, appearing in the March 3, 1975, issue of *Newsweek*, concerned abortion and the Edelin case in Boston, not *Roe v. Wade, supra*. Its analysis is clearly more helpful to Dr. Floyd than to Prosecutor Anders. For instance, the article mentions that in *Roe*

> "the U.S. Supreme Court cited the medical literature and expert opinion to establish the usual time of viability at about 28 weeks . . . ." *Newsweek*, March 3, 1975, at 25.

Further, the article states "Physicians emphasize, however, that a live birth does not mean that a fetus is viable. Viability implies that the infant can survive outside the mother and grow to maturity." *Newsweek* at 24. Both of these *Newsweek* passages contradict Anders and suggest that the 25 week presumption of the South Carolina abortion law is unconstitutional.

Due in part to Anders' reliance only on the student-prepared synopsis and the *Newsweek* article, the three-judge court found that Anders acted in bad faith. Factually, the court determined:

> "The difficulty was that the prosecutor had not read the opinion in *Roe v. Wade*. He had read about it in a magazine, and he had a digest of it prepared by a first-year law student which, in several respects, was quite misleading." (J.S. at 5a; *Floyd v. Anders, supra*, 440 F. Supp. at 539).

3. Anders' Disregard of the Order To Withdraw the Indictment

There is evidence in the record to indicate Anders' indifference to the federal district court order to withdraw the indictment. Such indifference is an additional element of bad faith. As previously mentioned, at the close of the TRO hearing, appellant Anders was directed to withdraw the indictment from the grand jury if it had not been formally returned by that time. This he did not do, later claiming lack of authority.

The transcript shows the following:

> "THE COURT: If they have returned a True Bill you are then restrained from prosecuting. If they haven't returned a True Bill the thing to do is withdraw it . . ." Tr. at 30, Hearing, August 28, 1975.

The temporary restraining order also states:

> "ORDERED, that Defendant Anders withdraw the proposed indictment from the grand jury forthwith . . . ."

Anders did not even contact the grand jury foreman. Taylor Dep. at 5). Appellant never returned to district court to object to the order nor to explain his noncompliance. He never once cited a case or statute to support his refusal to act. Furthermore, widespread news coverage was given to the indictments.

Case law suggests that Prosecutor Anders deliberately refused to exercise authority which he knew he possessed. *State v. Charles*, 183 S.C. 190, 190 S.E. 466 (1937), held that the prosecutor has discretionary power on his own without state court approval to enter a *nol pros* prior to empanelment of a jury. If he possesses such power, he certainly could have obeyed the federal court order to withdraw the indictment. That is a lesser

included power reasonably inferred. The federal supremacy clause is also binding upon Anders.

4. Anders' Disregard of Overwhelming Exculpatory Evidence

Anders' disregard of overwhelming exculpatory evidence is the final element of bad faith. Prosecutor Anders knew and/or recklessly disregarded overwhelming medical evidence which showed that he could have no "reasonable expectation of obtaining a valid conviction." *Kugler v. Helfant*, 421 U.S. at 126, n.6. This conclusion is based on the notes in evidence of Lt. Cook, Chief Investigator for the Prosecutor.

Only one gynecologist other than Dr. Floyd had physically examined Louise Doe before the abortion, Dr. Kanitkar. According to his deposition (Kanitkar Dep. at 9, 10) and as ascertained by Lt. Cook, she was 16 or 17 weeks pregnant on July 19, 1974. That would be extrapolated to 23 or 24 weeks pregnant on September 6, 1974, two days after the abortion. This is well within *Roe and* the state statute.

Lt. Cook made the notation of "*16 or 17 weeks pregnant*" on his legal pad and even *underlined* it. He told appellant Anders about meeting with Dr. Kanitkar. (Cook Dep. at 68). Cook did not tell the grand jury (Cook Dep. at 72), and Anders did not call Dr. Kanitkar to testify. Through his investigation, Lt. Cook also found that Louise Doe gave 4/28/74 as her LMP date, first day of last menstrual period before pregnancy (i.e. two weeks before conception). Extrapolated to September, this gives a length of pregnancy under 17 weeks at the time of the abortion. Again, the dates are crucial exculpatory evidence. These facts were withheld from the grand jury by the prosecutor.

In addition, it is clear that *Roe v. Wade*, 410 U.S. at 165, holds that a state *must* permit post-viability abortions if necessary for the "health" of the woman, 410 U.S. at 165, and that "health" includes "all factors – physical, emotional, psychological, familial, and the woman's age – relevant to the well-being of the patient." *Doe v. Bolton*, 410 U.S. at 191.

Yet, Prosecutor Anders and his agent Lt. Cook effectively suppressed and ignored highly probative evidence that an abortion was necessary for the psychological well-being of Louise Doe, regardless of the stage of pregnancy. The Social Worker's notes showed Louise Doe to be "very desperate," and "determine[d] to have an abortion." *Social Work Report on Louise Doe*, 7/25/74. Similarly, two nurses described Louise Doe as "very upset," and "depressed" about the pregnancy.

This apparent disregard by Anders of exculpatory evidence is a further indication of bad faith. Anders' reliance on fetal weights is not probative since this information is available only *after* the abortion is performed. Finally, fetal birthweights are not a conclusive indicator of the length of pregnancy because they show only what age the average fetus of that weight would be.

In conclusion, a reasonable study of the law should have shown prosecutor Anders that the pertinent sections of the South Carolina abortion law were inconsistent with *Roe v. Wade, supra*, and *Doe v. Bolton, supra*. Instead, he read *Newsweek*. Moreover, *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976), strengthens Dr. Floyd's case even more. Yet Anders persists in pressing this litigation.

Additionally, the medical history of Louise Doe conclusively showed a reasonable basis for estimating her length of pregnancy as within the law, and her mental

state justified an abortion in any event. Lt. Cook did not even add up the number of weeks Louise Doe was pregnant, a case of inexcusable neglect. As Chief Investigator on this case for Prosecutor Anders, Lt. Cook was the *sole* witness before the grand jury. He submitted no medical evidence and failed to mention crucial evidence vindicating Dr. Floyd. Thus, Anders' disregard of evidence exculpating Dr. Floyd provides the final element of bad faith.

II.

THE THIRD TRIMESTER - 25 WEEK CLAUSE OF THE SOUTH CAROLINA ABORTION LAW, S.C. CODE §44-41-20(c) (§32-682(c), 1962 CODE AS AMENDED), ABRIDGES THE RIGHT OF PRIVACY, IS INCONSISTENT WITH THE EXPRESS HOLDINGS OF *ROE v. WADE*, AND *PLANNED PARENTHOOD v. DANFORTH*, AND IS NOT SUPPORTED BY ANY COMPELLING MEDICAL EVIDENCE.

South Carolina Code §44-41-20(c) (formerly §32-681, 1962 Code, as amended), (J.S. at 9a - 10a), limits the circumstances "[d]uring the third trimester of pregnancy" when an abortion may lawfully be performed. The "third trimester of pregnancy" under §44-41-10(k), (J.S. at 9a), as incorporated in §44-41-20(c), is defined as "that portion of a pregnancy beginning with the twenty-fifth week of gestation." While §44-41-10(l)(J.S. at 9a) creates a legal presumption that viability occurs no sooner than the twenty-fourth week of pregnancy, this presumption does not mitigate the third trimester-25 week clause of §44-41-10(k), as incorporated in 44-41-20(c). Thus, the code specifies that the time when viability occurs is approximately 25 weeks, and proscriptions pertaining to abortion are imposed beyond that period.

Clearly, under *Planned Parenthood, supra*, 428 U.S. 52, the characterization of all fetuses as viable at twenty-

five weeks and the proscription of abortions beyond that stage is impermissible.

In *Roe v. Wade, supra*, this Court held that regulations which affect abortion-privacy rights are justified only if based upon a compelling state interests, and only if the statutes are narrowly drawn to express that state interest. 410 U.S. at 155. After the first trimester the State may regulate abortions only as to "maternal health," and after viability, the state has an interest in promoting the potentiality of the human life. As this Court stated:

> "[W]ith respect to the State's important and legitimate interest in potential life, the 'compelling' point is at viability." 410 U.S. at 163.

The Court, in *Roe, supra*, discussed "viability" noting:

> "viability is usually placed at about seven months (28 weeks) but may occur earlier even at 24 weeks." 410 U.S. at 160.

Until the point of viability, determined on a case by case basis, the woman's constitutionally protected right to choose to terminate her pregnancy must prevail over any interest the state may have in preserving the life of the fetus. As the three-judge court reasoned in this case, "Viability must, under *Roe* be determined on a fetus by fetus basis." (J.S. at 5a; *Floyd v. Anders, supra*, 440 F. Supp. at 539.)

The question of viability was discussed again in *Planned Parenthood v. Danforth, supra*. There, the Court held that viability is a medical concept to be determined by the attending physician as opposed to the courts or legislature. In reaffirming *Roe*, the Court said:

> "[I]t is not the proper function of the legislature or the courts to place viability, which essentially is a medical concept, at a specific point in the gestation period. The time when viability is achieved may vary with each pregnancy, and the determination of whether a particular fetus is viable is, and must be, a matter for the judgment of the responsible attending physician." 428 U.S. at 64.

The provisions in the South Carolina statute which fix the point of viability at 25 weeks directly contradict this Court's rulings that viability must be determined by a physician on a case by case basis. Thus, the statutory provisions which fix viability and proscribe abortions beyond that point must be found unconstitutional.

The South Carolina statute also lacks any rational medical foundation. As stated by Dr. Charles Hendricks, Chairman of Obstetrics/Gynecology at the University of North Carolina, based upon his extensive study on viability, "[a] presumption that every 25-week fetus will survive is simply untenable." (Hendricks Aff. at 4.)

Dr. Theodore King, Director of Obstetrics/Gynecology at Johns Hopkins, agrees: "A presumption that every 25 week fetus will survive is certainly, in my clinical experience, unreasonable." (King Aff. at 4.) Numerous other medical experts in affidavits and studies supported this view before the three-judge court. Thus, the court below determined that viability should be determined on a "fetus by fetus basis." (J.S. at 5a; *Floyd v. Anders, supra*, 440 F. Supp. at 539). *See also* Sec. III A, *infra*.

As stated earlier, regulations which affect fundamental rights are justified only if there is a compelling state interest. 410 U.S. at 155. To date, the state has not offered any compelling justification for its 25 week presumption of viability. The legislative draftsman of this law, Dr. Dudley Saleby, Jr., was deposed, and stated that he derived the 25 week figure from *Roe v. Wade*, not from any medical evidence. (Saleby Dep. at 37). As has

been shown, however, his analysis was a misinterpretation of *Roe*. He eventually admitted that the *Roe* opinion said nothing "about the third trimester." (Saleby Dep. at 42). In the absence of evidence demonstrating a compelling state interest, the South Carolina Code clearly does not pass constitutional scrutiny. Since the statute is invalid, this Court need not be concerned with differences, if any, between the Missouri and *Roe* definitions of viability.

III.

IN ANY CASE, THE ABORTION OF LOUISE DOE WAS PROTECTED WITHIN THE CONFINES OF *ROE v. WADE* AND *PLANNED PARENTHOOD v. DANFORTH*

A. The Louise Doe Abortion Was Pre-Viable As a Matter of Law

As the appellant admits in his brief (J.S. at 7), Dr. Floyd estimated Louise Doe's pregnancy to be approximately 20 weeks at the time of the clinic visit. This finding was independently corroborated by Dr. Kanitkar at the Gregg Street Health Department Clinic in the Family Planning Record, 7/19/74. Louise Doe gave a menstrual history to Dr. Kanitkar consistent with a pre-viable fetus in the Social Work Report, Clinic Continuation Sheet, and the Family Planning Record of Louise Doe. These were well documented and known to appellant Anders and his investigators. Anders, however, relied solely on the weight of the fetus, which was unknown and unknowable to Dr. Floyd prior to removal of the fetus from the womb. Thus, Dr. Floyd, applying his own best medical judgment, determined that the fetus was pre-viable and performed the abortion. This process of determining when a fetus is pre-viable for purposes of performing an

abortion was endorsed in *Planned Parenthood v. Danforth*, 428 U.S. at 61. This Court stated:

> ". . . the stage subsequent to viability, a point purposefully *left flexible for professional determination* and dependent upon *developing medical skill and technical ability*." 428 U.S. at 61. (Emphasis added)."

The requirements of flexibility for professional determination as well as developing medical skill and technical ability are two areas that Anders only briefly considers. For example, even if Dr. Floyd was able to determine fetal weight prior to the abortion, fetal weight still would not conclusively indicate when viability is reached. It would establish merely the range of gestation. Thus, a professional determination of viability must still be made. Expert affidavits submitted with appellee's motion show that a fetal weight of 1049 grams is not always over 25 weeks or post-viable as appellants presumed. Dr. Hendricks states, "it would be possible for an infant with a birth weight of 1049 grams actually to have represented a pregnancy of only 24 menstrual weeks gestation, or 22 weeks post-conception." (Hendricks Aff. at 5). Dr. King of Johns Hopkins agreed: "An infant that weights 1,050 grams at birth could be delivered from a pregnancy as short as 23 or 24 weeks in duration . . . ." (King Aff. at 4). The same opinion is given by Dr. Horger at the Medical University of South Carolina (Horger Aff. at 6).

Even the depositions cited by the appellant indicate that fetal birth weight is not conclusive. Dr. Kanitkar admits to discrepancies of up to four weeks (Kanitkar Dep. at 11, 12). Similarly, Dr. Wall and Dr. Garrett admit to the imprecise nature of fetal birth weights. (Wall Dep. at 3, and Garret Dep. at 12). Further, even if the Doe fetus is conclusively established to be 28

weeks gestation, this would not necessarily indicate viability. As Dr. Garrett, the pathologist who performed the autopsy on the Doe fetus testified concerning the cause or causes of death:

> "Well, in my opinion, the major underlying cause which virtually everything else in the autopsy report could be explained on, is the fact that he was markedly premature when born. And, this led to many of the complications which are listed here, which are pathologic findings, all of which added up to his demise." (Garrett Dep. at 37).

Indeed, appellant's brief admits that "death was caused by the numerous complications which arose from the child's premature birth." (Appellant's brief at 6). Prematurity and pre-viability are closely related.

Not only does Anders insufficiently discuss the need for flexible professional determinations of viability, but he also fails to consider the unavailability of "medical skill and technical ability" that aid in determining viability. In this case, appellant apparently suggests that ultrasound would have been appropriate in this case. Yet, the deposition of Dr. Dennis, the Director of Obstetrics and Gynecology at Richland Memorial Hospital, mentioned in appellant's brief (J.S. at 7) indicates that ultrasound was not locally available between July and September, 1974, when Dr. Floyd determined the gestational age. Dr. Dennis was asked how long ultrasound had been available at the hospital. He responded:

> "Well, the unit was purchased in July, [1974] but as far as any effective utilization of it, then I would say that December, January of this year [1975] would be the first, for the initial months of it – purely that we were investigating or learning to use it ourselves." (Dennis Dep. at 17).

And Dr. Horger, Professor of Obstetrics and Gynecology at the Medical University of South Carolina, stated in his affidavit:

> "Unfortunately, ultrasound was not available for use in the Columbia, South Carolina area during the period between June and September, 1974." (Horger Aff. at 5).

Thus, all of the evidence indicates that appellant Anders misunderstood the medicine of this case as badly as the law.

B. If Not Pre-Viable, the Louise Doe Abortion was Within the Mental Health Qualification of *Roe v. Wade*

Even if one assumes the unlikely alternative of a deliberate post-viable abortion on Louise Doe, the mental health qualification of *Roe* was satisfied as shown by the medical charts of Louise Doe, and the affidavits of Dr. Floyd's assistants who had contact with Louise Doe.

Roe and *Doe* include under mental health "that the medical judgment may be exercised in the light of all factors – physical, emotional, psychological, familial, and the woman's age – relevant to the well-being of the patient." *Doe v. Bolton*, 410 U.S. 179, 191-192 (1973). *Doe* incorporporated from *United States v. Vuitch*, 402 U.S. 62, 71-72 (1971), a definition of health encompassing "psychological as well as physical well-being." *Doe, supra*, 410 U.S. at 191-192. Further, this Court emphasized the need for such factors: "This allows the attending physician the room he needs to make his best medical judgment." 410 U.S. at 192.

Here there was substantial *uncontradicted independent evidence* in the medical records of Louise Doe that she was "very upset," "very desperate," "determined to

have an abortion" and "very depressed." Two nurses and a social worker made these observations separately. They show that the abortion was necessary for Louise Doe's psychological well-being, whatever the length of pregnancy, and was, therefore, within the parameters of the federally protected right of privacy. Yet, the appellant's brief fails to even mention, let alone refute, the mental health qualification of *Roe*.

CONCLUSION

For the reasons set forth above, the Court should dismiss this appeal for want of a substantial federal question or, in the alternative, affirm the judgment of the United States District Court for the District of South Carolina, Columbia Division.

Respectfully submitted,

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